CHUNG TAIN KONG A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CRIMINAL APPEAL NO: S-05-44-2003]
22 JUNE 2009 C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Defences - Private defence - Essential elements of right of self defence - Burden of proof - Standard of proof - Whether accused had reasonable apprehension of danger to his body or life - Whether accused entitled to exercise right of private defence - Penal Code, ss. 96, 99, 302* D

CRIMINAL LAW: *Private defence - Essential elements of right of self defence - Burden of proof - Standard of proof - Penal Code, ss. 96, 99, 302*

E

EVIDENCE: *Statement - Cautioned statement - Corroborative value - Whether accused's cautioned statement corroborated claim of right of self defence - Issue of self defence not mentioned in cautioned statement*

The deceased and her three siblings had gone to the house where F
the deceased had previously lived in with the appellant. They went there to fetch the deceased's clothing since she had decided to leave the appellant. The deceased and the appellant went into the house together whilst her siblings waited outside the house. Five minutes later they heard the deceased screaming and they G
rushed into the house and kicked open the door of the bedroom where the appellant and deceased were. The deceased was lying on the floor and the appellant was standing next to the door, holding a 'Rambo' knife. He was then seen stabbing himself on the stomach and his neck. The deceased had suffered 19 wounds H
with a fatal stab wound in the chest. According to the appellant, when he advanced towards the deceased to plead to her not to leave him, she grabbed a Rambo knife from atop a cupboard and threatened to stab him. The appellant claimed that when he continued his advance, she stabbed him in the neck. A struggle I
then ensued where the appellant tried to grab the knife and during the struggle, the knife pierced into her body. The appellant said that he then took the knife and stabbed the deceased because

A he was scared that she might stab him and kill him. The appellant was charged and convicted for the murder of the deceased under s. 302 of the Penal Code and hence this appeal by the appellant. The appellant raised the following issues: (i) that this was a case of self defence where the appellant had also suffered injuries in B defending himself, thereby making the killing justifiable; and (ii) that the learned trial judge had failed to consider the appellant's cautioned statement (exh. D2) made four days after his arrest as corroboration of his defence.

C **Held (dismissing the appeal)**
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) Section 96 of the Penal Code would absolve one of any wrongdoings if it was done in the exercise of the right of D private defence. It recognises such an act as a complete statutory defence. The burden of proving those circumstances in order to bring a case within the scope of right of private defence is on an accused person. The standard of proof is on a preponderance of probabilities. However the initial burden to E establish the complicity of the accused is on the prosecution. (paras 32 & 33)

(2) Four cardinal justification must exist before the killing of an assailant can be justified in a plea of self-defence: (i) the F accused must be free from fault in bringing about the encounter; (ii) there must be present an impending peril to life or of great bodily harm either real or so apparent; (iii) there must be no safe or reasonable mode of escape by retreat, and (iv) there must have been a necessity of taking life. These G justifications must be read together with the provisions of s. 99 Penal Code in particular s. 99(4). (paras 36 & 37)

(3) When the fatal blow was struck on the deceased, she was already lying on the floor, injured, unarmed and harmless. At H that point, the appellant had seized the knife away from her, and he was standing over her. There was no impending danger to the appellant's life or grievous hurt to himself. Even if there was indeed such an apprehension of danger in the mind of the appellant, he could have escaped or retreated in I the face of that danger instead of attacking the deceased. The appellant was not acting in necessary self defence. (paras 44, 45, 46, 47, 49 & 50)

(4) The appellant could use exh. D2 to corroborate his own consistency, veracity and accuracy of his later evidence in court. However, the appellant did not mention in exh. D2 that he had acted in self defence. If it was so mentioned it would certainly have had a corroborative value and impact on his s. 96 defence. In fact the non mention in exh. D2 that he acted so for fear of his own life supported the learned trial judge's conclusion that he was actually not acting in self-defence. (paras 62, 65 & 66)

Bahasa Malaysia *Translation Of Headnotes*

Si mati dan tiga adik beradiknya telah pergi ke rumah yang pernah didiami si mati bersama dengan perayu. Mereka pergi untuk mengambil pakaian si mati kerana si mati berhasrat untuk berpisah dengan perayu. Si mati dan perayu telah sama-sama masuk ke rumah sementara adik beradik si mati menunggu di luar. Lima minit kemudian mereka mendengar si mati menjerit yang berakibat mereka terus meluru ke dalam rumah dan menendang pintu bilik di mana si mati dan perayu berada. Si mati ketika itu dilihat terbaring di atas lantai sementara perayu pula berada di tepi pintu dengan memegang sebilah pisau Rambo. Perayu kemudian dilihat menikam perut dan lehernya sendiri. Si mati didapati mengalami 19 kecederaan tikaman dengan satu tikaman fatal di dada. Menurut perayu, apabila beliau mendekati si mati bagi memujuknya untuk tidak meninggalkan beliau, si mati telah mengambil pisau Rambo dari atas almari dan mengugut untuk menikamnya. Perayu mengatakan bahawa apabila beliau terus mendekati si mati, si mati terus menikam leher beliau. Satu pergelutan kemudian berlaku di mana beliau cuba untuk merampas pisau tetapi pisau tersebut tertikam ke badan si mati. Menurut perayu lagi beliau kemudian mengambil pisau dan menikam si mati kerana bimbang si mati mungkin akan menikam dan membunuhnya. Perayu dituduh dan disabit kerana membunuh si mati di bawah s. 302 Kanun Keseksaan dan ini adalah rayuan terhadap keputusan tersebut. Isu-isu berikut telah dibangkitkan oleh perayu: (i) bahawa ini adalah satu kes mempertahankan diri di mana beliau juga mengalami kecederaan dalam mempertahankan diri beliau, dan kerana itu pembunuhan adalah berjustifikasi; dan (ii) bahawa yang arif hakim bicara gagal menimbang kenyataan beramaran (eks. D2) yang beliau buat empat hari selepas penangkapannya sebagai menyokong pembelaannya.

A **Diputuskan (menolak rayuan)**
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 96 Kanun Keseksaan memaafkan mana-mana perbuatan salah jika ianya dilakukan untuk mempertahankan diri. Ia mengiktiraf perbuatan sedemikian sebagai satu pembelaan statutori sepenuhnya. Beban untuk membuktikan keadaan-keadaan yang boleh membawa suatu kes ke dalam skop hak mempertahankan diri adalah terletak atas tertuduh. Standard pembuktian adalah atas keberatan kebarangkalian. Bagaimanapun, beban awal untuk membuktikan keterlibatan tertuduh adalah atas pendakwaan.

(2) Dalam suatu pli pertahanan diri, empat justifikasi penting harus wujud sebelum pembunuhan seseorang penyerang boleh dijustifikasikan: (i) tertuduh bebas dari kesalahan mencetuskan pergaduhan; (ii) harus wujud kemungkinan bahaya kepada nyawa atau kecederaan badan yang teruk sama ada berbentuk sebenarnya ataupun apparent; (iii) harus tidak wujud jalan keluar untuk mengundur diri yang selamat atau munasabah; dan (iv) harus wujud keterdesakan untuk mengorbankan nyawa. Justifikasi-justifikasi ini hendaklah dibaca bersama dengan peruntukan s. 99 Kanun Keseksaan, terutama s. 99(4)nya.

(3) Bilamana tikaman fatal dilepaskan ke atas si mati, beliau sudah pun berada di atas lantai, dalam keadaan tercedera, tidak bersenjata dan tidak berdaya untuk berbuat apa-apa. Pada waktu itu, perayu merampas pisau dari tangan si mati, dan berdiri mengadap si mati. Tiada sebarang bahaya yang mungkin datang dari si mati terhadap nyawa perayu atau yang boleh menyebabkan kecederaan teruk kepadanya. Jikapun sekiranya memang wujud kemungkinan bahaya sedemikian pada fikiran perayu, beliau berupaya untuk lari atau melepaskan diri dan mengelak dari menikam si mati. Perayu jelas tidak bertindak untuk mempertahankan diri.

(4) Perayu boleh menggunakan eks. D2 bagi menyokong kekonsistenan, kebenaran dan ketepatan keterangan yang beliau berikan kemudiannya. Bagaimanapun, perayu tidak menyebut di dalam eks. D2 bahawa beliau bertindak untuk mempertahankan diri. Jika itu disebut, ia tentunya akan

mempunyai nilai dan kesan koroboratif atas pembelaan s. 96nya. Malah, kegagalan menyebut di dalam eks. D2 bahawa beliau telah bertindak demikian kerana takutkan nyawanya terancam telah menyokong konklusi yang arif hakim bicara bahawa beliau sebenarnya tidak bertindak untuk mempertahankan diri.

Case(s) referred to:
Ahmad Shah Hasim v. PP [1980] 1 MLJ 77 ***(refd)***
Lee Thian Beng v. Public Prosecutor [1972] 1 MLJ 248 ***(refd)***
Liew Wah Ming v. PP [1963] 29 MLJ 82 ***(refd)***
Mohamed Ali v. PP [1962] MLJ 230 ***(refd)***
Palmer v. The Queen [1971] 2 WLR 831 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113(3)
Evidence Act 1950, s. 157
Penal Code, ss. 96, 99(4), 100(a), (b)

Other source(s) referred to:
Ratanlal & Dhirajlal, *Law of Crimes,* 25th edn, p 344

For the appellant - Datuk Chan Chin Tang (Yong Pei Yi with him); M/s Chau & Thien
For the respondent - Ahmad Bache DPP

Reported by Amutha Suppayah

JUDGMENT

Abdull Hamid Embong JCA:

[1] The appellant was convicted for the murder of his live-in girlfriend after a full trial.

[2] The charge was:

> That you, on the 17th day of January, 2000 at about 2.30 p.m., at a house number 18, Lorong Muntahan 3, Taman Cendawan, in the District of Kota Kinabalu, in the State of Sabah, did commit murder by causing the death of one LEE CHIN CHIONG (F) 36 years and that you have thereby committed an offence punishable under Section 302 of the Penal Code (F.M.S Cap 45).

[3] On the fateful day, the deceased and her three siblings, Lee Kin Fui (PW4), Chia Sing Chin (PW6) and Lee Khin Moi went to the house where the deceased had previously lived in with the appellant. They went there to fetch the deceased's clothing since the deceased had decided to leave the appellant. The house was previously jointly rented by the deceased and the appellant.

[4] Upon arrival at the house, the deceased found that the padlock had been changed and so she could not enter.

[5] She then called the appellant through her mobile phone and asked him to come over to open the door.

[6] Later when the appellant arrived, he and the deceased went into the house together.

[7] The deceased's accompanying siblings waited outside the house.

[8] Some five minutes later they heard the deceased screaming out for her brother, PW4.

[9] The three siblings rushed into the house with PW4 leading.

[10] Inside the house, PW4 had to kick open the door of the bedroom, where the appellant and deceased were.

[11] In that bedroom, PW4 saw the deceased lying on the floor, waving a signal to her siblings not to enter, and pointing to the appellant.

[12] The appellant was standing next to the door, holding a 'Rambo' knife. He then stabbed himself on the stomach and his neck using the knife he was holding.

[13] The siblings then left the room and called the police, who arrived shortly afterwards.

[14] PW6 testified that the day before the incident she knew that the deceased and the appellant were not on talking terms.

[15] The pathologist, PW2 testified that the deceased had suffered 19 wounds. The fatal one was a stab wound which had penetrated into the chest cavity of the deceased; cutting her left lung and heart.

[16] The cause of death was described by PW2 as "stab wound in the chest" which the trial court accepted.

[17] The learned trial judge correctly evaluated the prosecution's case and in particular the evidence of the two main witnesses ie, PW4 and PW6. His Lordship made the following findings:

> This Court cautioned itself that both PW4 and PW6 are siblings to the deceased. There is a danger that they may want to assist their late sister. However after fully recognizing their relationship, and upon evaluating and perusing their evidence, there is nothing to suggest that they are unreliable witnesses. PW4 would appear to this court as reluctant witness and PW6, maintained her story throughout even when she was later recalled to the witness stand again.

[18] As regards the defence, we need only to reproduce the following findings of the learned trial judge as found in the grounds of judgment. The learned trial judge said:

> The accused (DW1) in his evidence under oath told the Court that after he had opened the door to the said house he and the deceased went into the room therein on January 17th 2000. They have been living together. He saw the deceased's brother and sisters who waited outside. The deceased told him that she wanted to take her clothes although she did not say why.
>
> When questioned by the accused as to why she wanted to take her clothes, the deceased told him to mind his own business and to leave her alone.
>
> The accused also told the Court that he asked her to stay and if there was anything, they could always discuss.
>
> While the deceased was packing her clothes, the accused approached her. The deceased took a knife which was on top of the cupboard, and warned him, not to get too near to her or she would stab him with the knife.
>
> Not believing that the deceased would make good her threat, the accused continued to approach her. True to her treat, the deceased stabbed the accused. A struggle ensued, with the accused trying to snatch the knife from her. In the process the accused managed to twist her arm to her back and pushed her against the wall, thus, the accused alleged, causing the knife to penetrate her body.

A When the deceased fell onto the floor, the accused took hold of the knife and stabbed her, thus killing her. Apart from the admission, the accused further admitted that the deceased died as a result of injuries inflicted upon her by the accused. The accused said he stabs her for fear that while the deceased stabbed him she might kill him. He also feared for his life when the deceased B stabbed him on his neck.

Ironically, the accused then stabbed himself in the stomach intending to kill himself for according to him, life without the deceased would be meaningless, because he loves her so much.

C **[19]** Before us, learned counsel for the appellant raised the same issues as he did in the trial court. Two leading issues were raised.

[20] It was contended firstly, that this was a case of self defence where the appellant had also suffered injuries in defending himself. D And so, the killing was justifiable.

[21] Secondly, it was contended that the learned trial judge had failed to consider the cautioned statement made by the appellant (exh. D2) four days after his arrest as corroboration of his E defence.

Self Defence

[22] As regards the self defence, the appellant had, in his evidence, stated that when he advanced towards the deceased to F plead to her not to leave him, she grabbed a Rambo knife from atop a cupboard and threatened to stab him.

[23] The appellant ignored the deceased's threat and continued his advance. It was then that she stabbed him in the neck.

G **[24]** A struggle then ensued where the appellant tried to grab the knife.

[25] During the struggle, the appellant managed to twist the deceased's arm behind her back and pushed her against the wall. H

[26] In the process the knife pierced into her body and the deceased fell to the floor.

[27] The appellant then took the knife and stabbed the deceased. I He explained that he did so because he was scared that the deceased might stab him and kill him.

[28] The appellant admitted to injuring himself by stabbing his stomach since, he said, life has no meaning anymore. He said he intended to kill himself.

[29] The appellant also had some minor injuries on his palm.

[30] Based on that version of the appellant's case, it was submitted that the act of the appellant was justifiable.

[31] The killing was said to be done in the exercise of the right of private defence.

[32] Section 96 of the Penal Code would absolve one of any wrongdoing if it was done in the exercise of the right of private defence. It recognises such an act as a complete statutory defence.

[33] The burden of proving those circumstances in order to bring a case within the scope of right of private defence is on an accused person. The standard of proof is on a preponderance of probabilities. However the initial burden to establish the complicity of the accused is on the prosecution. (see commentary by Ratanlal & Dhirajlal's in *Law of Crimes*, p. 344)

[34] Section 99 of the Penal Code however lay down certain restrictions where such a right does not extend.

[35] Section 100 Penal Code lay down the scope of such a right where it operates even to a situation of voluntarily causing the death of the assailant provided that the assault is such that it may "reasonably cause the apprehension that death will otherwise be a consequence of such assault". (see s. 100(b))

[36] However four cardinal justification must exist before the killing of an assailant can be justified in a plea of self-defence. These are described in Ratanlal and Dhirajlal's *Law of Crimes* 25th edn. as:

(i) The accused must be free from fault in bringing about the encounter,

(ii) There must be present an impending peril to life or of great bodily harm either real or so apparent,

(iii) There must be no safe or reasonable mode of escape by retreat, and

(iv) There must have been a necessity of taking life.

[37] These justifications must also be read together with the provisions of s. 99 Penal Code in particular s. 99(4) which states that:

> the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict **for the purpose of defence.** (emphasis added)

[38] This particular defence will thus need to be considered against the particular facts and circumstances of the case.

[39] In this case we had considered this defence from two aspects. Firstly whether the use of force by the appellant was completely necessary and secondly, whether the killing of the deceased was in the circumstances, justified. (see *Lee Thian Beng v. Public Prosecutor* [1972] 1 MLJ 248).

[40] In assessing this defence, the learned trial judge had correctly adverted to the facts and circumstances of the case and in particular in relation to the injuries sustained by the deceased.

[41] His Lordship made the following observations:

> Despite the claim by the accused that the deceased stabbed him after warning him not to approach her, the medical evidence given by a qualified Pathologist (Forensic) appear to suggest that the injuries inflicted upon the deceased especially injuries 12, 13, 14, 15, 16, 17, 18, 19 are usually seen in someone trying to defend oneself.

[42] And the learned judge came to the following conclusion in evaluating the defence:

> Even assuming that the deceased stabbed the accused, the fact that the deceased fell on to the floor and from the evidence of PW6 the deceased appears to have breathing difficulty (page 165 Notes of Evidence) was it justifiable for the accused to get hold of the knife and stabbed her and thus killing her. This Court feels otherwise because the accused in his own testimony confirmed his strength in that he twisted the deceased right arm to the back and further showed his strength by pushing the deceased against the wall (page 150 Notes of Evidence.)
>
> In this instant case the killing was manifestly unnecessary and unwarranted. The stabbing to death of the deceased by the accused was not justifiable and unreasonable and such act is in excess of private defence especially done to a physically inferior

and weaker person, see *Lee Thian Beng* v. *Public Prosecutor* [1972] 1 MLJ 248 and *Public Prosecutor v. Abdul Manap* [1956] 2 MLJ 214.

In circumstances, there can be no justification for a man of considerable strength to kill a defenceless lady least of all, to exonerate oneself, by wielding the shield of private defence.

[43] We are in full agreement with that finding by the trial judge and found no fault in the reasons given for making that finding.

[44] In addition to the trial court's finding, we wish to say that when the fatal blow was struck on the deceased, she was already lying on the floor, injured, unarmed and harmless.

[45] At that point, the appellant had seized the knife away from her, and he was standing over her. He was then armed with the Rambo knife.

[46] Was there then an impending danger to the appellant's life or grievous hurt (s. 100(a) & (b) Penal Code) to himself? The answer is clearly no.

[47] Further, even if there was indeed such an apprehension of danger in the mind of the appellant, could he not have escaped or retreated in the face of that danger instead of attacking the deceased? The answer is a clear yes!

[48] For this defence to apply, the underlying circumstances must be tested against the simple question as posed by Lord Morris of Berth-Gest in *Palmer v. The Queen* [1971] 2 WLR 831, that is - "was the appellant acting in necessary self defence?" which, for this case, our answer would be, no.

[49] In the circumstances of this case, we find no reasonable cause for the appellant to stab the deceased who was already down and unarmed. Also, we find that at that point there cannot be any more reasonable apprehension of danger to the appellant, for him to act the way he did.

[50] As such we find no merit in the submission by learned counsel that the appellant had acted in self defence and should be completely absolved for his act. This plea thus must fail.

A **The Cautioned Statement**

[51] Next it was submitted that the learned trial judge had failed to consider the cautioned statement (exh. D2) as a corroboration of his defence. As such there has been an omission to give a
B proper judicial appreciation to the facts. Learned counsel also stated that it was incumbent upon the learned judge to consider the truth or otherwise of the contents of D2.

[52] It is true that the learned trial judge did not advert to D2.

C **[53]** We now need to consider if there had been a misdirection by the learned trial judge to vitiate the conviction.

[54] We scrutinised D2 and found it to be non-exculpatory.

D **[55]** In D2, the appellant had stated that the deceased threatened to kill him if he continued to advance towards her. The appellant then explained that there was then a struggle, during which he suffered some injuries.

[56] These were the same primary facts adduced by the appellant
E in his sworn testimony during the trial.

[57] However there was no mention by the appellant in D2 that he was in fear of his life when the deceased threatened him to stop his advances towards her.

F **[58]** This fear which resulted in him killing the deceased purportedly in self defence is the core issue that could have been corroborated by anything said in D2 pointing to that fear.

[59] Corroboration is defined as evidence in support of the
G principal evidence (see *Mozley and Whiteley's Law Dictionary*).

[60] Section 157 of the Evidence Act, (read together with s. 113(3) of the Criminal Procedure Code) allows for a former statement of a witness made at about the time when the fact took
H place, (such as D2 in this case) to be proved and considered to corroborate a later testimony as to the same fact. In *Sarkar on Evidence* (15th edn.) it was stated that "the philosophy of the section is that when the mind of the witness is so connected with events as to make it probable, any statement made by him then
I would be true and accurate".

[61] For easy reference those two provisions are now reproduced:

Section 157 Evidence Act states:

> **Former statements of witness may be proved to corroborate later testimony as to same fact.**
>
> 157. In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Section 113 Criminal Procedure Code states:

> (3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

[62] The appellant could thus use D2 to corroborate his own consistency, veracity and accuracy of his later evidence in court.

[63] Ong J in *Mohamed Ali v. PP* [1962] MLJ 230, had this to say of corroboration under s. 157, and we agree:

> Corroboration, strictly speaking, means independent corroboration as explained in *R v. Baskerville* [1916] 2 KB 658. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' as it appears in s. 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

[64] The Court of Appeal in *Liew Wah Ming v. PP* [1963] 29 MLJ 82 made the following observations on s. 157:

> Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact and no hard-and-fast rule, capable of mechanical application, can be laid down.

[65] However, the appellant did not mention in D2 that he had acted in self defence. If it was so mentioned it would certainly have a corroborative value and impact on his s. 96 defence. And surely the learned trial judge would not have missed this.

[66] In fact the non mention in D2 by the appellant that he acted so for fear of his own life supported the learned trial judge's conclusion that he was actually not acting in self-defence. The appellant could have easily said so in his cautioned statement.

[67] As such, it is our finding that there was nothing in D2, for the trial judge to consider as corroboration of his defence. What was stated in D2 was nothing more than a repeat of the appellant's principal evidence during the trial. And that evidence had been fully considered and appreciated by the learned trial judge.

[68] The learned trial judge who in our view had assessed the facts with great care, had not misdirected himself when he made this finding on the appellant's testimony:

> It is therefore the view of this Court that the accused has been less than truthful in his testimony. The veracity and probity thereof is questionable.

[69] It is trite that a finding on the credibility of a witness by the trial court should not be disturbed by an appellate court. The Federal Court in *Ahmad Shah Hasim v. PP* [1980] 1 MLJ 77 stated this established principle with this ratio:

> We are however satisfied that he had made the same representations to the learned judge, who had considered them and who had on the totality of the evidence combined with his personal assessment of the witness's reliability from seeing him in the witness box come to the findings he did make. Under such circumstances, where the findings depend on an assessment of the credibility and reliability of a witness, it is not the practice of this court sitting on appeal to refuse to accept them.

[70] For these reasons, we dismissed the appeal and affirmed the conviction and sentence of the High Court.